



**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 1**

[FAC 2023-03, FAR Case 2022-002, Item II; Docket No. FAR-2022-0002, Sequence No. 1]

**RIN 9000-AO39**

**Federal Acquisition Regulation: Exemption of Certain Contracts from the Periodic Inflation Adjustments to the Acquisition-Related Thresholds**

**AGENCY:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2022 that provides a statutory exception to the periodic inflation adjustments of acquisition-related thresholds for certain bond requirements.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Marissa Ryba, Procurement Analyst, at

314-586-1280 or by email at [Marissa.Ryba@gsa.gov](mailto:Marissa.Ryba@gsa.gov). For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755 or [GSARegSec@gsa.gov](mailto:GSARegSec@gsa.gov). Please cite FAC 2023-03, FAR Case 2022-002.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

DoD, GSA, and NASA published a proposed rule at 87 FR 58300 on September 26, 2022, to implement section 861 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022 (Pub. L. 117-81), which provides for a statutory exception to the periodic inflation adjustments of acquisition-related thresholds under 41 U.S.C. 1908. Three respondents submitted comments on the proposed rule.

### **II. Discussion and Analysis**

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. All of the respondents expressed support for the rule because maintaining the current thresholds for performance and payment bonds ensures continued payment protections benefiting small businesses. The Councils acknowledge this support. No changes were made to the final rule as a result of public comments.

### **III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Services and**

## **Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items**

This rule does not create new solicitation provisions or contract clauses or revise the text of any existing provisions or clauses. The rule does not change any current requirements in the provisions or clauses but does prevent future periodic inflation adjustments to acquisition-related thresholds.

### **IV. Expected Impact of the Rule**

This rule does not have a significant impact on the Government or industry because this rule maintains acquisition-related thresholds that have been in the FAR for several years without significant change.

The FAR threshold for performance and payment bonds at FAR 28.102 had one escalation adjustment in 2010, which raised the threshold by \$50,000 from \$100,000 and has since remained unchanged. The FAR threshold for alternatives to payment bonds at FAR 28.102 is currently \$35,000; it was escalated twice, one in 2006 and again in 2015. Each adjustment raised the threshold by \$5,000 starting from \$25,000. Since the second adjustment, this threshold has also remained unchanged.

Because the acquisition-related thresholds under FAR 28.102 have remained mostly unchanged, there is little expectation for future increases or changes that would affect Government and industry. There is also no expected

cost impact of this rule since the acquisition-related thresholds will remain the same. There may be some benefit of consistency to the public by ensuring that the thresholds remain the same.

## **V. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

## **VI. Congressional Review Act**

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the "Submission of Federal Rules Under the Congressional Review Act" form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the *Federal Register*. The Office of Information and Regulatory Affairs (OIRA) in the

Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

## **VII. Regulatory Flexibility Act**

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601-612. The FRFA is summarized as follows:

DoD, GSA, and NASA are amending the Federal Acquisition Regulation (FAR) to implement section 861 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022 (Pub. L. 117-81) that provides a statutory exception to the periodic inflation adjustments of acquisition-related thresholds for certain bond requirements.

The objective of the final rule is to retain the current dollar thresholds for performance and payments bonds as well as the threshold for alternatives to such bonds.

There were no significant issues raised by the public in response to the initial flexibility analysis provided in the proposed rule.

The final rule applies to small entities performing construction services for the Government; however, the impact is expected to be de minimis. Contract actions with a value between \$35,000 and \$150,000 will still require an alternative to payment bonds for payment protection, and those with a value exceeding \$150,000 will still require performance and payment bonds. The rule makes permanent the thresholds that have been in place for several years, resulting in no changes for any entity performing construction services.

Data obtained from the Federal Procurement Data System (FPDS) for FY 2019, 2020, and 2021 indicates that an average of 678 unique small entities received an estimated 1,219 awards annually that require alternatives to payment bonds. FPDS data also indicates that an average of 1,340 unique small entities received an estimated 2,706 awards that are subject to performance and payment bonds annually. Approximately 2,018 (678 + 1,340) unique small entities will continue to comply with current bond requirements as a result of this final rule.

The final rule does not include additional reporting or record keeping requirements.

There are no available alternatives to the final rule to accomplish the desired objective of the statute.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory

Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

#### **VIII. Paperwork Reduction Act**

The Paperwork Reduction Act (44 U.S.C 3501-3521) applies to the information collection described in this rule; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000-0045, Bid Guarantees, Performance and Payment Bonds, and Alternative Payment Protection.

#### **List of Subjects in 48 CFR Part 1**

Government procurement.

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Therefore, DoD, GSA, and NASA amend 48 CFR part 1 as set forth below:

**PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM**

1. The authority citation for 48 CFR part 1 continues to read as follows:

**AUTHORITY:** 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

2. Amend section 1.109 by revising paragraph (c)(1) to read as follows:

**1.109 Statutory acquisition-related dollar thresholds - adjustment for inflation.**

\* \* \* \* \*

(c) \* \* \*

(1) 40 U.S.C. chapter 31-

(i) Subchapter III, Bonds; and

(ii) Subchapter IV, Wage Rate Requirements

(Construction);

\* \* \* \* \*

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